89-890

No. __-____

IN THE

Supreme Court of the United States

October Term, 1989

HOOPA VALLEY TRIBE AND
HOOPA VALLEY TIMBER CORPORATION
Petitioners,

vs.

RICHARD NEVINS, CONWAY COLLIS, ERNEST DRONENBERG, WILLIAM BENNETT, KENNETH CORY, CALIFORNIA STATE BOARD OF EQUALIZATION AND STATE OF CALIFORNIA,
Respondents.

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

Whether claims that a state timber severance tax (1) frustrates the federal regulatory scheme with respect to Indian reservation timber, and (2) infringes the right to tribal self-government, are cognizable under 42 U.S.C. § 1983.

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No.

IN THE SUPREME COURT

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OCTOBER TERM, 1989

HOOPA VALLEY TRIBE AND
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vs.

RICHARD NEVINS, CONWAY COLLIS, ERNEST DRONENBERG, WILLIAM BENNETT, KENNETH CORY, CALIFORNIA STATE BOARD OF EQUALIZATION AND STATE OF CALIFORNIA,
Respondents.

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Cross-Petitioners Hoopa Valley Tribe and Hoopa Valley Timber Corporation respectfully request that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this action on July 28, 1989.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit (Pet. App. 1-15)[1]/ is reported at 881 F.2d 657. The decision of the United States District Court for the Northern District of California is unpublished and is reprinted in the Appendix to this Cross-Petition at pages A-1 throuh A-6.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on July 28, 1989. No petition for rehearing was filed. The petition in Nevins v. Hoopa Valley Tribe, No. 89-686 was filed within 90 days of July 28, 1989, and was received by respondent and cross-petitioners on October 30, 1989. This cross-petition for certiorari is timely filed pursuant to Sup. Ct. R. 19.5. The court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Supremacy Clause of the United States Constitution; 42 U.S.C. §§ 1983 and 1988 (1983); 25 U.S.C. §§ 407 and 1300i-7 (Supp. 1989); General Forest Regulations, 25 C.F.R. Part 163 (1989). The provisions of Titles 25 and 42 of the United States Code are reprinted in the appendix at pages A-7 through A-10. The provisions of the Supremacy Clause and the General Forest Regulations are reprinted at Pet. App. 26 and 27-44 respectively.

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[1]/ Unless otherwise indicated, all references to "Pet. App." are to the Appendix to the Petition for a Writ of Certiorari filed by the State of California in No. 89-686.

STATEMENT OF THE CASE

This action was brought pursuant to 28 U.S.C. §§ 1331, 1343 and 1362. Cross-petitioners generally adopt the statement of the case in No. 89-686 but point out that in the circumstances of this case the Hoopa Valley Tribe was liable for, and paid, amounts equal to the California Timber Yield Tax pursuant to the contracts under which the Tribe's timber was harvested from Reservation trust lands.

The tax and attorney's fees issues were briefed at different times and decided separately by the District Court. In the memorandum decision and order of October 6, 1987, Appendix at A-1 through A-6, the court relied on White Mountain Apache Tribe v. Williams, 810 F.2d 844 (9th Cir. 1984), to reject the Tribe's claim to fees based upon the preemptive effects of 25 U.S.C. § 407 and the General Forest Regulations. The District Court declined to rule on the Tribe's motion for summary judgment based upon the tribal right of self-government but concluded that that claim could not be a "substantial" one because it was not cognizable under 42 U.S.C. § 1983.

The Court of Appeals affirmed the District Court on both the merits and the denial of attorney's fees. While the court agreed with the Tribe that "[t]he right to self-government qualifies as a substantial claim," Pet. App. at 12, 881 F.2d at 661-662, the court concluded that such claims are not cognizable under Section 1983, and therefore could not support a fee award under 42 U.S.C. § 1988.[2/]

[2/] The Tribe waived the right to file a brief in opposition to California's Petition in No. 89-686 by letter to the clerk dated November 17, 1989. By suggesting in that letter that the lower court's opinion on the issues addressed in the Petition warranted summary affirmance, the Tribe did

REASONS FOR GRANTING WRIT

I

THE RULING ON ATTORNEY'S FEES TURNS ON AN ISSUE CURRENTLY AWAITING DECISION BY THIS COURT IN GOLDEN STATE TRANSIT CORP. V. CITY OF LOS ANGELES AND INVOLVES A CONFLICT AMONG FEDERAL AND STATE DECISIONS.

A decision by this Court reversing the Ninth Circuit Court of Appeals in Golden State Transit Corp. v. City of Los Angeles, No. 88-840 (argued October 3, 1989), would remove entirely the basis for the lower court's rejection of the Tribe's fee claim based on 42 U.S.C. § 1988.[3]/ In the interests of uniformity of federal law on the scope of 42 U.S.C. § 1983, eliminating the conflict that currently exists among the Ninth Circuit and the Supreme Courts of Arizona and New Mexico, and fairness to Indian litigants, the lower court's judgment with respect to attorney's fees should be vacated and remanded for reconsideration in light of Golden State Transit Corp.[4]/

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not endorse the lower court's opinion with respect to attorney's fees. This cross-petition is filed so that all rulings below would be available to this Court.

[3]/ 42 U.S.C. § 1988 allows an attorney's fee in actions "to enforce a provision of" 42 U.S.C. § 1983 and certain other statutes. Appendix at A-10.

[4]/ A related attorney's fees issue is among the questions presented in Continental Bank Corp. v. Lewis, 827 F.2d 1517 (11th Cir. 1987), clarified, 838 F.2d 457 (11th Cir.

In Golden State Transit Corp. v. City of Los Angeles, ___ U.S. ___, 109 S. Ct. 1117, 103 L. Ed.2d 180, (February 21, 1989), this Court granted certiorari to the United States Court of Appeals for the Ninth Circuit, limited to the following question:

> Whether in the absence of a direct violation of a federal statute, an allegation that a state statute is preempted by a federal statute is cognizable under 42 U.S.C. § 1983.

The Ninth Circuit had answered that question in the negative in Golden State Transit Corp. v. City of Los Angeles, 857 F.2d 631 (9th Cir. 1988), relying chiefly on their earlier opinion in White Mountain Apache Tribe v. Williams, 810 F.2d 844, cert. denied, 479 U.S. 1060 (1987). Specifically, White Mountain Apache is the basis for the propositions that § 1983 "enforces federal statutory rights only against direct violations of the federal statute in question," 857 F.2d at 635, and that "preemption of state law under the Supremacy Clause -- at least if based on federal occupation of the field or conflict with federal goals -- will not support an action under § 1983." 857 F.2d at 636. These holdings from White Mountain Apache v. Williams, reflected in Golden State Transit Corp., are the two principal reasons for the lower court's refusal to award the Tribe attorney's fees based upon either federal preemption of the state tax or the alternative argument that the right to tribal self-government was secured by the Constitution or laws of the United States. See 881 F.2d at 661, 662, Pet. App. at 11, 12.

That the right to harvest Indian tribal timber free from state actions that frustrate the comprehensive federal

statutes and regulations governing such timber is a right "secured by the Constitution or laws" of the United States, presents a question of substantial importance to the administration of Indian property throughout the nation. It is time now to examine the issue left open by the denial of certiorari in White Mountain Apache, supra, 479 U.S. 1060 (1987), and avoided in Confederated Salish and Kootenai Tribes v. Moe, 425 U.S. 463, 468 n.7, 475 n.14 (1976) (state personal property tax not validly applied to Reservation Indians).

The New Mexico Supreme Court has held, in the context of the Indian Self-Determination and Education Assistance Act, that a similar comprehensive statute and regulatory scheme created rights "secured by the Constitution and laws" and supported an award of fees. Ramah Navajo School v. Bureau of Revenue, 104 N.M. 302, 720 P.2d 1243 (App.), cert. denied, 479 U.S. 940 (1986). See also Lac Courte Oreilles Band v. Wisconsin, 663 F. Supp. 682, 688-90 (W.D. Wis. 1987), app. dismissed, 829 F.2d 601 (7th Cir. 1987) (treaty based rights within §§ 1983, 1988); Chase v. McMasters, 573 F.2d 1011, 1017-18 (8th Cir.), cert. denied, 439 U.S. 965 (1978) (Indian right implicit in 25 U.S.C. § 465 within § 1983). These rulings conflict with the Ninth Circuit's ruling in White Mountain Apache Tribe v. Williams, supra, 810 F.2d 844, and also conflict with an opinion of the Arizona Supreme Court, Central Machinery v. Arizona, 152 Ariz. 134, 730 P.2d 843 (1986), cert. denied, 481 U.S. 1042 (1987) (preemption resulting from Indian traders statute not within § 1983).

Since the Court will clarify the relationship between federal preemption and the rights protected by 42 U.S.C. § 1983 in Golden State Transit Corp. v. City of Los Angeles, supra, cross-petitioners respectfully suggest that this Court should either grant the petition in No. 89-686 and this cross-petition for the purposes of resolving the conflict

among courts and correcting the application of White Mountain Apache Tribe v. Williams to Indian preemption cases, or else vacate the lower court's opinion with respect to attorney's fees in light of the Court's ruling in Golden State Transit Corp.

II

WHETHER THE TRIBAL RIGHT OF SELF-GOVERNMENT IS "SECURED BY THE CONSTITUTION AND LAWS" OF THE UNITED STATES IS AN IMPORTANT QUESTION FOR THIS COURT

This court has "repeatedly recognized the Federal Government's longstanding policy of encouraging tribal self-government." Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, ___, 107 S. Ct. 971, 975 (1987). But the right of tribal self-government derives its force from legislation and provisions establishing Indian reservations or recognizing tribal authority, not simply from statements in Court decisions.[5/]

[5/] See New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 335 (1983) (goal of promoting tribal self-government "embodied in numerous federal statutes"); Santa Clara Pueblo v. Martinez, 436 U.S. 49, 59-60, 71 (1978) (rights of tribal members); Bryan v. Itasca County, 426 U.S. 373 (1976) (reservation property tax immunity); Fisher v. District Court, 424 U.S. 382 (1976) (judicial forum); McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 172-73 (1973) (reservation income tax immunity); The Kansas Indians, 72 U.S. (5 Wall.) 737, 755-57 (1867) (property tax immunity); Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 555-63 (1832) (inapplicability of state law); F. Cohen, Handbook of Federal Indian Law, 231, 267-79) (1982 Ed.).

42 U.S.C. § 1983 offers important protection to this federal right.

While the right of tribal self-government is often a factor in finding federal preemption in Indian affairs, "[t]he self-government doctrine differs from the preemption analysis and is an independent barrier to state regulation." Crow Tribe of Indians v. Montana, 819 F.2d 895, 907 (9th Cir. 1987), aff'd, 484 U.S. 997 (1988) (citing White Mountain Apache Tribe v. Bracker, 448 U.S. 136 at 142-43; Crow Tribe of Indians v. Montana, 650 F.2d 1104 at 1110 (9th Cir. 1981)). But if the lower court is correct in concluding that the barrier erected by the tribal right of self-government is not "secured by the laws" of the United States, then Indian tribal rights will be denied complete relief and successful litigants will be denied the reimbursement of attorney's fees that Congress intended to provide in 42 U.S.C. § 1988. Section 1983 and its counterpart, 28 U.S.C. § 1343, provide an important jurisdictional basis for actions involving Indian tribal privileges and immunities, actions often brought by individuals without other access to the courts. The uniquely federal nature of tribal rights has long been recognized to compel their adjudication in federal court. E.g., Oneida Indian Nation of New York v. Oneida County, 414 U.S. 661 (1974) (construing 28 U.S.C. § 1331).

The lower court decision treats the issue whether infringement of tribal self-government is a deprivation of rights within the meaning of § 1983 as case of first impression. The Ninth Circuit resolved that question merely by a reference to an obscure law review article,[6/] and a

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[6/] E. Mettler, A Unified Theory of Indian Tribal Sovereignty, 30 Hastings L.J. 89 (1978). The court also cited two passages from F. Cohen, Handbook of Federal

prior ruling on fishing rights under a treaty having no bearing on the claims below. United States v. Washington, 813 F.2d 1020 (9th Cir. 1987), cert. denied, __ U.S. ___, 108 S. Ct. 1593 (1988).[7]/ But, the lower court's analysis fails: merely because federal laws or treaties operate to preserve some preexisting rights of Indian tribal governments predating the formation of the United States, cannot lead one to conclude that the tribal right of self-government is not "secured" by federal law. Were that the case, then because people were "endowed by their Creator with certain inalienable Rights", The Declaration of Independence (U.S. 1776), those rights, although now reflected in the laws of the United States, would lack protected status under § 1983 simply because the rights pre-dated the Constitution. Clearly, it is the manner in which rights are established in federal law, and not the antecedents of the rights, that should be considered under § 1983. The Court should clarify that attributes of inherent tribal sovereignty that are protected by federal statutes and regulations are "secured" within the meaning of § 1983. See, e.g., Wright v. Roanoke Redev. & Housing Auth., 479 U.S. 418 (1987).

In addition, the lower court's attempt to characterize the tribal right to self-government as "a power, rather than a

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Indian Law (1982 ed.). That treatise however holds that [t]he recognition of tribal self-government [is] embodied in legislation and treaties establishing reservations." Id., at 231; accord id., at 273, 275.

[7]/ But see United States v. Washington, 384 F. Supp. 312, 399 (W.D. Wash. 1974), aff'd 520 F.2d 676 (9th Cir. 1975), cert. denied, 423 U.S. 1086 (1976) (finding jurisdiction for violation of same treaty fishing rights under 28 U.S.C. § 1343 (3) and (4)).

right," Pet. App. at 13, 881 F.2d at 662, and thus excluded from the scope of § 1983, smacks of sophistry. Like the personal liberties/proprietary rights dichotomy rejected in Lynch v. Household Finance Corp., 405 U.S. 538 (1972), the lower court's right/power dichotomy gives no analytical assistance to guide courts around the country. This distinction will be impossible to draw with any consistency or principled objectivity. The Ninth Circuit's own examples of membership, fishing and taxation illustrate that the tribal right of self-government does protect important personal liberties and privileges of individual Indians. Compare Pet. App. at 13, 881 F.2d at 662 with cases cited at n.5, supra.

Finally, the lower court's attempt generally to shut off relief under 42 U.S.C. §§ 1983 and 1988 for deprivations of the right of tribal self-government under the theory that that right is merely protected by federal common law, and not by statutes authorizing creation of Indian reservations or by treaties, simply ignores the specific inquiry that lower courts should make into the precise text of treaties and statutes, construed in the appropriate manner. See generally Washington v. Fishing Vessel Association, 443 U.S. 658, 675-76 (1979) (special rules of interpretation). Federal Indian law is not cut from whole cloth but is based on specific federal enactments creating rights that warrant the remedies of § 1983.

While no treaty is applicable in the present case, this Court has previously construed treaties establishing Indian reservations as having the effect of reserving the right of tribal self-government, e.g., Williams v. Lee, 358 U.S. 217, 220-21 (1959); McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 172-73 (1973). In many cases, including this

one, special statutes explicitly preserve the right of tribal self-government.[8]/

The lower court's theory that the right of self-government is not secured by the Constitution and laws of the United States will cause tremendous mischief in the law. Unless corrected, it will lead naturally to the question of why the right of self-government could ever operate as a barrier to state incursions on reservations if it does not have behind it the force of federal law. This case raises important questions for this Court.

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[8]/ Section 8 of Pub. L. 100-580, Appendix at A-8, provides: "[t]he existing governing documents of the Hoopa Valley Tribe and the governing body established and elected thereunder, as heretofore recognized by the Secretary, are hereby ratified and confirmed." 25 U.S.C. § 1300i-7 (Supp. 1989). This statute was enacted after the case below was briefed. See also United States v. Kagama, 118 U.S. 375, 382 (1866) (Hoopa Valley Indians retain "power of regulating their internal and social relations"); Donnelly v. United States, 228 U.S. 243, 271 (1913) (statute establishing Hoopa Valley Reservation excludes state authority over crimes involving Indians).

III

CONCLUSION

For the reasons set forth above, it is respectfully submitted that a writ of certiorari should be issued to the Court of Appeals for the Ninth Circuit.

Dated this 29th day of November, 1989.

Respectfully submitted,

Thomas P. Schlosser
Attorney for Hoopa Valley
Tribe and Hoopa Valley
Timber Corporation

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

THE HOOPA VALLEY TRIBE, et al. Plaintiffs, vs. RICHARD NEVINS, et al., Defendants, and H. WESTBROOK, III and R.L. WESTBROOK, d/b/a RESERVATION RANCH, et al., Defendants and Cross-Defendants	NO. C-82-5903-MHP MEMORANDUM DECISION AND ORDER

Plaintiffs brought this action in October 1982 against the California State Board of Equalization, five individual members of the Board, and the State of California, challenging the application of state statutes taxing timber harvested on tribal land. Plaintiffs sought partial summary judgment on both preemption and tribal sovereignty grounds. In June 1984, the court granted plaintiffs' motion on preemption grounds. The United States Court of Appeals for the Ninth Circuit has since held that

preemption of state law under the supremacy clause will not support a claim of attorneys' fees under 42 U.S.C. § 1988. White Mountain Apache Tribe v. Williams, 810 F.2d 844, 850 (9th Cir. 1984).[1]/ Plaintiffs are now before this court on a renewed motion for summary judgment under Fed. R. Civ. P. Rule 56(c) and on their motion for section 1988 attorneys' fees. They seek adjudication of the tribal sovereignty issue in order to qualify for attorneys' fees. In the alternative, they request the court to find that the tribal sovereignty claim constitutes a substantial but unadjudicated claim for purposes of obtaining attorneys' fees under section 1988. Upon careful consideration of the memoranda and accompanying documents filed both in support of and in opposition to the motions, the pleadings on file herein and counsels' arguments before this court, the court denies plaintiffs' motions for summary judgment and attorneys' fees for the reasons set forth below.

Background

Plaintiffs originally brought this action on October 26, 1982, challenging application of the timber yield tax and the timber reserve fund tax established by the 1976 California Forest Taxation Reform Act (Cal. Rev. & Tax. Code §§ 38101-38908). Specifically, plaintiffs claimed that application of the taxing statutes and regulations was an unconstitutional burden on Indian commerce which violated the supremacy clause, United States Constitution, art. I, § 8, cl. 3, as well as 25 U.S.C. §§ 405-407 and 25 C.F.R. § 163 (1982). They further claimed that such application violated their tribal sovereignty and infringed upon their right to self-

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1/ Williams was originally cited as 798 F.2d 1205. That decision was withdrawn after a series of rehearings. The original holding, however, appears intact in the final decision.

government, violated various California laws, and deprived them of their rights, privileges, and immunities in violation of 42 U.S.C. § 1983.

Plaintiffs moved for summary judgment on federal preemption and infringement of tribal sovereignty grounds. On July 6, 1984, this court granted plaintiffs' motion for partial summary judgment. Hoopa Valley Tribe v. Nevins, 590 F. Supp. 198 (N.D. Cal. 1984). Because the court concluded that the state taxing statute was preempted by federal law, it did not reach the issue of tribal sovereignty. Id. at 199.

Meanwhile, on February 7, 1984, the Ninth Circuit held that preemption of state law under the supremacy clause generally will not support an action under section 1983, and therefore will not support a claim of attorneys' fees under 42 U.S.C. § 1988, the Civil Rights Attorneys' Fees Award Act of 1976. White Mountain Apache Tribe v. Williams, 810 F.2d at 850. On June 23, 1986, plaintiffs, in an effort to preserve an attorneys' fees claim, moved to amend their complaint to clarify that a section 1983 cause of action not based on preemption was asserted in the original complaint. On August 1, 1986, this court denied the motion to amend the section 1983 claims, concluding that whether such a cause of action was asserted in the original complaint would best be decided by recourse to the original complaint.

On July 22, 1987, plaintiffs again moved for summary judgment and attorneys' fees pursuant to section 1988. They argue that they have sufficiently alleged a preemption claim, a tribal sovereignty claim, and a general tax immunity claim, at least one of which is cognizable under section 1983 and for which attorneys' fees are available under section 1988. Although the challenge to the state tax was adjudicated in 1984 on preemption grounds, plaintiffs request that summary judgment be granted on tribal sovereignty grounds. In the

alternative, they request that the court find that either the tribal sovereignty or the general tax immunity claim constitutes a substantial but unadjudicated claim for purposes of collecting attorneys' fees under section 1988, as provided for in Hagans v. Lavine, 415 U.S. 528 (1974).

Discussion

A. Summary Judgment

Although plaintiffs prevailed on their challenge to the California taxing statutes in July 1984, they seek to readjudicate that challenge on the basis of either tribal sovereignty or general tax immunity in order to qualify for attorneys' fees. Plaintiffs failed to raise or argue the general tax immunity claim in the original motions for summary judgment, and only briefly argued the tribal sovereignty claim at that time. Plaintiffs neglected to press further the tribal sovereignty claim or bring to this court's attention the problems associated with the Ninth Circuit's holding in Williams until three years after judgment on the merits. Both the defendants and this court understood damages to be the only remaining issue after this judgment.

Although plaintiffs did raise the tribal sovereignty claim before the present motion, their delayed efforts evoke a similar response to that of the Ninth Circuit in Williams. "[T]his is a case where the . . . claims were never pressed beyond the original federal complaint until they were dusted off for use in seeking a fee award under § 1988. 810 F.2d at 854. Plaintiffs have been awarded relief for violation of their substantive rights. This court will not now reach the merits of the tax immunity claim or the tribal sovereignty claim except as necessary to reach the issue discussed below.

B. Substantial Unadjudicated Claim

Plaintiffs argue that the tribal sovereignty claim is a substantial but unadjudicated claim cognizable under section 1983. Although Hagans does provide for attorneys' fees where substantial legal issues are raised but not adjudicated, plaintiffs are not eligible for fees because their claim is not cognizable under section 1983. 415 U.S. at 537-38. Section 1983 is a remedy for deprivations of rights secured by the United States Constitution or by some federal statute.[2/] Plaintiffs acknowledged this at oral argument. The Ninth Circuit explained in Williams that "[s]ection 1983, as interpreted in Thiboutot and its progeny, enforces federal statutory rights only against direct violations of the federal statute in question." 810 F.2d at 851 n.9. The court held that the supremacy clause, which does not secure any federal rights, generally would not support an action under section 1983. Id. at 850.

Similarly, the Hoopa Tribe's right to self-government preceded, and therefore is not secured by, any federal statute or the Constitution. McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 172 (1972). Plaintiffs argue that subsequent federal laws "protect" the right to self-government. Specifically, they argue that the Act of April 1864, 13 Stat. 39, and the Executive Order of June 23, 1876 created the Hoopa Indian reservation and implicitly secured the right to self-government. Plaintiffs, however, never alleged the violation of these laws in the complaint. Like

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[2/] "Every person who . . . subjects . . . any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." 42 U.S.C. § 1983 (emphasis added).

the preemption claim in Williams, the tribal sovereignty claim is not premised on any federal statute, and is therefore not cognizable under section 1983.

Accordingly, plaintiffs' motions for summary judgment and for attorneys' fees are denied.

IT IS SO ORDERED.

Dated: OCT 6 - 1987

MARILYN HALL PATEL
United States District Judge

25 U.S.C. 407

§ 407. Sale of timber on unallotted lands.

Under regulations prescribed by the Secretary of the Interior, the timber on unallotted trust land in Indian reservations or on other land held in trust for tribes may be sold in accordance with the principles of sustained-yield management or to convert the land to a more desirable use. After deduction, if any, for administrative expenses under section 413 of this title, the proceeds of sale shall be used --

(1) as determined by the governing bodies of the tribes concerned and approved by the Secretary, or

(2) in the absence of such a governing body, as determined by the Secretary for the tribe concerned.

25 U.S.C. § 1300i-7

§ 1300i-7. Hoopa Valley Tribe; Confirmation of Status.

The existing governing documents of the Hoopa Valley Tribe and the governing body established and elected thereunder, as heretofore recognized by the Secretary, are hereby ratified and confirmed.

42 U.S.C. § 1983

§ 1983. Civil Action for Deprivation of Rights.

Every person who, under color of any statute, ordinance, regulations, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1988

§ 1988. Proceedings in Vindication of Civil Rights; attorney's fees.

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

No. 89-890

(2)

In The

Supreme Court of the United States

October Term, 1989

HOOPA VALLEY TRIBE AND
HOOPA TIMBER CORPORATION,

Petitioners,

vs.

RICHARD NEVINS, CONWAY COLLIS,
ERNEST DRONENBURG, WILLIAM BENNETT,
CALIFORNIA STATE BOARD OF EQUALIZATION
AND STATE OF CALIFORNIA,

Respondents.

BRIEF IN OPPOSITION TO CROSS-PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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BRIEF IN OPPOSITION TO CROSS-PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

As requested by the Clerk's letter of January 31, 1990 respondents Richard Nevins, et al ("The State") respond to the cross-petition of the Hoopa Valley Tribe, et al. ("The Tribe") for certiorari.

The cross-petition arises out of the same judgment as the State's petition for certiorari in No. 89-686, in which all briefs have been filed.

STATEMENT OF THE CASE

The Tribe filed its first motion for summary judgment on February 1, 1984. The Tribe placed its principal reliance on the Supremacy Clause preemption claim, although it did discuss the tribal sovereignty claim briefly at the tail end of its brief. On July 6, 1984 the District Court issued a decision granting the motion on the preemption claim but leaving the tribal sovereignty claim undecided.

On February 7, 1984 the Ninth Circuit issued its decision in *White Mountain Apache Tribe v. Williams*, 798 F.2d 1205 (9th Cir. 1984). *White Mountain* held that a Supremacy Clause violation lies outside the scope of the Civil Rights Act, 42 U.S.C. § 1983, and therefore will not support an attorney's fees award under 42 U.S.C. § 1988.

On July 22, 1987, more than three years later, the Tribe moved for summary judgment a second time on the tribal sovereignty claim. The sole purpose of the motion was to lay the basis for an attorney's fees award claim. (Cr.-Pet. App., p. A-3.)

On October 6, 1987 the District Court issued its decision declining to rule on the Tribe's second motion for summary judgment. In doing so the District Court noted:

> "Plaintiffs neglected to press further the tribal sovereignty claim [after the 1984 ruling] or bring to this court's attention the problems associated with the Ninth Circuit's holding in *Williams* until three years after judgment on the merits. Both defendants and this court understood damages to be the only remaining issue after this judgment." (Cr.-Pet. App., p. A-4.)

REASONS FOR DENYING A WRIT

I

A SUPREMACY CLAUSE VIOLATION WILL NOT SUPPORT AN ATTORNEY'S FEES AWARD UNDER 42 U.S.C. § 1988

The Tribe first argues that it is entitled to attorney's fees on the basis of its successful claim that the California timber tax is preempted by the General Forest Regulations promulgated by the Secretary of the Interior for Indian timber.[1] But in *Golden State Transit Corp. v. City of Los Angeles*, ___ U.S. ___, 110 S.Ct. 444, 448-49 (1989), decided after the cross-petition was filed, this Court held that the Supremacy Clause does not create rights enforceable under § 1983. As the Tribe admits, *Golden Transit* controls this case. (Cr.-Pet., pp. 4-5.)

It is true that *Golden Transit* recognized that a federal law which preempts state action may also create a federal right for which a § 1983 remedy is available. However, at no point in this litigation has the Tribe argued that the regulations create an independent right in Indian tribes to be free of the possible economic burden of a state tax imposed on non-Indian purchasers of Indian timber. Nor could such an argument be made inasmuch as the regulations merely deal with such matters as fire prevention and bidding procedures and do not even mention, let alone specifically prohibit, state taxation.

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[1] These regulations are reproduced in the appendix to the State's petition in No. 89-686 commencing at page A-27.

II

THE TRIBE'S RIGHT TO SELF-GOVERNMENT IS NOT SECURED "BY THE CONSTITUTION AND LAWS" WITHIN THE MEANING OF § 1983

The tribal sovereignty claim cannot support a § 1988 fee award because, as this Court recognized in *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164, 172-73 (1973), the Tribe's right to self-government predates the formation of our federal government and therefore is not "secured by the Constitution and laws" within the meaning of § 1983. There is no reason to review the Ninth Circuit's thoughtful analysis on this issue. *Hoopa Valley Tribe v. Nevins*, 881 F.2d 657 (9th Cir. 1989).[2]

None of the seven decisions which the Tribe cites at footnote 5 of its cross-petition support the proposition that the right of tribal self-government "derives its force" from federal legislation. For example, *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 335 (1983), the first decision listed in the footnote, merely holds that the federal government is "firmly committed" to the right of self-government. A statute expressing a commitment to a right is not the same thing as a statute creating a right. The other six decisions are similarly distinguishable.

The only statute the Tribe cites as supporting its argument is 25 U.S.C. § 1300i-7, in which Congress "ratified and confirmed" the Tribe's governing documents. But by its own terms § 1300i-7 does not create a right of

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[2] The Ninth Circuit's decision is reproduced in the appendix to the State's Petition in No. 89-686 commencing at page A-1.

self-government; it instead acknowledges that the Tribe has exercised the right in a proper manner. Furthermore, to view § 1300i-7 as the source of the Tribe's governmental powers leads to the conclusion, surely unintended by the Tribe, that the Tribe did not have a right to govern itself prior to 1989, when § 1300i-7 was enacted.

The Tribe also argues that, if the right to tribal sovereignty is not considered to be a right established by federal law, then Indian litigants will be deprived the remedy "that Congress intended to provide in 42 U.S.C. § 1983." (Cr.-Pet., p. 8.) This argument fails because there is no indication that Congress had such an intent.

Lastly, the Tribe complains that the courts below disregarded their duty to make a "specific inquiry . . . into the precise text of treaties and statutes, construed in the appropriate manner." (Cr.-Pet., p. 10.) But in the very next paragraph the Tribe admits that "no treaty is applicable in this case", and noted above the only statute cited by the Tribe, 25 U.S.C. § 1300i-7, is likewise inapplicable.

III

THE TRIBAL SOVEREIGNTY CLAIM CANNOT SUPPORT A FEE AWARD BECAUSE IT IS NOT A SUBSTANTIAL UNADJUDICATED CLAIM WITHIN THE MEANING OF *MAHER V. GAGNE*, 448 U.S. 122 (1980)

Below the State argued that the Tribe was not entitled to a § 1988 fee award on the basis of its tribal sovereignty claim because the claim was not a basis of the judgment in the Tribe's favor. The Ninth Circuit rejected this argument, instead ruling without discussion that the claim

was a substantial unadjudicated claim within the doctrine of *Maher v. Gagne*, 448 U.S. 122 (1980). *Hoopa Valley Tribe v. Nevins, supra*, 881 F.2d 657, 661-62. The State nevertheless contends that the absence of any significant relationship between the claim and the judgment provides an alternative ground for denying the writ.

Although *Maher* holds that § 1988 fees may be awarded to a prevailing party on the basis of a substantial unadjudicated claim, it has never been understood as allowing fees for a claim which played no role at all in the outcome of the case. See *Smith v. Robinson*, 468 U.S. 992, 1006 (1984), holding that in determining whether to award § 1988 fees, "[d]ue regard must be made, . . . to the relationship between the claims on which effort was expended and the ultimate relief obtained."

In this case there is no relationship between the tribal sovereignty claim and the judgment in the Tribe's favor. The claim was only briefly mentioned in the Tribe's first motion for summary judgment, was not ruled on, and was dusted off more than three years later, long after the merits of the case had been decided. The Tribe's tactical maneuver in reviving the claim therefore brings to mind Justice Powell's warning about claims asserted "solely for the purpose of obtaining fees in actions where 'civil rights' of any kind are at best an afterthought." *Maine v. Thiboutot*, 448 U.S. 1, 24 (1980), dissenting.

CONCLUSION

For the reasons forth above it is respectfully submitted that the cross-petition for a writ of certiorari should be denied.

DATED: March 1, 1990

Respectfully submitted,

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